Reg. No. GR/RNP/GOA/32

RNI No. GOAENG/2002/6410

Panaji, 21st January, 2008 (Magha 1,1929)

SERIES II No. 42

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA

Department of Labour

—

Notification

No. 28/18/2007-LAB

The following Award passed by the Industrial Tribunal of Goa at Panaji-Goa on 4-7-2007 in reference No. IT/ /11/94 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 23rd August, 2007.

———

IN THE INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT-I, PANAJI-GOA

(Before Dilip K. Gaikwad, Presiding Officer)

Case No. IT/11/94

Filomena Fernandes,
Near St. Anthony's High School,
Karaswada, Mapusa,
Bardez-Goa. ..... Workman/Party I

V/s

M/s. Mac Tailors,
Feira Alta, Mapusa,
Bardez-Goa. ..... Employer/Party II

Workman/Party I — represented by Adv. P. J. Kamat.
Employer/Party II — represented by Adv. T. Pereira.

AWARD

(Passed on this 4th day of July, 2007)

This is a reference under Sec. 10(1)(d) of Industrial Disputes Act, 1947 (hereinafter in short referred to as the said Act, 1947).

1. Facts giving rise to the present reference stated in brief are as follows:

The Government of Goa in exercise of powers conferred on it under Section 10(1) (d) of the said Act, 1947 by order dated 29-11-93 has referred to this Tribunal following dispute for adjudication:–

1. Whether the action of M/s. Mac Tailors, Feira Alta, Mapusa Goa, in terminating the services of Smt. Filomena Fernandes, Tailor with effect from 16-5-1992 is legal and justified?

2. If not, to what relief the workman is entitled?

2. Pursuant to notices, both the parties put in their appearance. The Party I filed her claim statement on 7-2-94 at Exb 4. It appears from claim statement that the Party II is an establishment as defined under Goa, Daman & Diu Shops and Establishments Act, 1973, and Rules, 1975 framed thereunder (in short, the said Act, 1973 and the said Rules, 1975, respectively).

3. The Party I was working with the Party II as a Tailor w. e. f. 12-4-85. Her last drawn wages were Rs. 450/- per month. She worked as a Tailor with the Party II honestly, deligently and obediently for a period of seven years. The Party II orally terminated her services w.e.f. 16-5-92 in contravention to provision contained in the said Act, 1973 and in the Rule 23 of the said Rules, 1975. The Party II did not comply with provision contained in Section 25 of the said Act, 1947 while terminating her services. She raised dispute before Competent Authority i. e. Assistant Labour Commissioner, Mapusa. Proceedings which were held by the Assistant Labour Commissioner ended in failure. Therefore, the Government of Goa has referred the dispute to this Tribunal for adjudication as stated earlier.

4. The Party I by filing claim statement asserted that termination of her service by the Party II is illegal,

unjust and malafide. She has claimed for reinstatement in service as a Tailor with full back wages.

5. The Party II by filing its written statement on 4-11-94 resisted the claim statement. It appears from the written statement that the Party II is not an industry as defined in the said Act, 1947. There is no industrial dispute between the parties. The business activities carried on by the Party II are covered by the said Act, 1973 and also by the said Rules, 1975. The Party I has a remedy to seek redressal of her grievances under the said Act, 1973. She is not entitled to take recourse of provision contained in the said Act, 1947. Therefore, the reference is not maintainable. The Industrial Tribunal has no jurisdiction to try and to decide the reference.

6. Further, it appears from averments in the written statement that the Party II is a small scale establishment. Joseph Pereira is its sole proprietor. The Party II is specialist in stitching gents clothes. The Party I was doing work as Helper on a casual and temporary basis and that too only when she was in need of such work. She does not possess requisite skill to work as a Tailor. She was doing work of hamming, ironing and of stitching as per marking on clothes. Claim made out by her that she was working as a Tailor is false. She raised quarrel with another employee/helper by name Mrs. Cassilda Lobo. She told the Proprietor of the Party II that she is not willing to come for work from the next day i. e. from 16-5-92. She collected dues equal to 15 days salary and left the job on the very day i. e. on 15-5-92. The Party II never received representation which according to Party I is made before the Assistant Labour Commisssioner. She has abandoned her service. It is a misconduct on her part. She is at liberty to join her service. Since she was never appointed as a Tailor, question of her reinstatement as a Tailor does not arise. On these and the above grounds the Party II prayed for dismissal of the reference.

7. The Party I presented here Rejoinder on 19-1-97 at Exb.7. She has denied in toto all contentions which are raised by the Party II in its Written Statement and which are adverse to her. It is needless to reproduce denials of the contentions.

8. On basis of pleadings of the parties, the then learned Presiding Officer framed issues on 6-2-95 at Exb. 8. The issues are as follows:—

1. Whether Party I proves that she was employed with Party II as a "Tailor" and her last drawn salary was Rs. 450/- per month.

2. Whether Party I proves that Party II terminated her services in contravention of Sec. 39 and Rule 23 of the Goa, Daman & Diu Shops and Establishments Act and the Rules made thereunder?

3. Whether Party I proves that Party II terminated her services in contravention of Sec. 25-F of the I. D. Act, 1947?

4. Whether Party II proves that the reference is not maintainable for the reasons stated in para 1 to 4 of the written statement?

5. Whether Party I proves that the action of Party II in terminating the services of Party I w. e. f. 16-5-92 is illegal and unjustified?

6. Whether Party I is entitled to any relief?

7. What Award?

9. My findings on the above issues are as follows:

1. In the affirmative.
2. Termination is proved to be in contravention of Section 39 of the said Act, 1973.
3. In the affirmative.
4. In the negative.
5. In the affirmative.
6. In the affirmative.
7. As per Final Order.

REASONS

10. *Issue No. 1:-* The Party I examined herself at Exb. 17. According to her, she was working as a Tailor with the Party II w. e.f. 12-4-85. As a Tailor, she was doing work of stitching pockets, collars, sleeves and button holes etc. She was doing the work of stitching as per markings done on the clothes.

11. In support of her case, the Party I examined a witness Prakash Bandekar at Exb. 18. This witness is working as Labour Inspector at Mapusa Goa. He is required to maintain registration file of each of the establishments. He pointed out that the Party II is an establishment registered under the said Act, 1973 w. e. f. 14-2-77. He has produced registration file of the Party II. Same is at Exb. W-10. Evidence of this witness is not material at this stage.

12. The Party II examined Peter Rodrigues on its behalf at Exb. 19. According to him, Joseph Pereira is sole Proprietor of the Party II establishment, which is specialized in stitching gents clothes. The said Joseph Pereira has executed Deed of Power of Attorney in his favour on 8-7-92. Xerox copy of the Deed is produced by him at Exb. E-1. He is employed in the Party II establishment. He is doing work of cutting and stitching clothes. He is holding Diploma in cutting and tailoring gents garments. Xerox copy of the Diploma-Certificate dated 14-10-76 issued by Tailoring Institute of London which is produced by him is at Exb. E-2. His evidence further shows that the Party I was working as Helper in the Party II establishment.

She was doing work of stitching clothes and of making button holes. She was doing stitching work as per markings done on the clothes. In addition, she was doing work of stitching back-side pockets of pants with help of machine. She was unable to do work independently. She was in need of guidance in respect of work entrusted to her from time to time.

13. The Party II also examined a witness Smt. Justina D'Souza at Exb. 20. She was also doing work as Helper with the Party II. She supported that the Party I was doing work of stitching back-side pockets of pants as per markings done by Assis Rodrigues working in the establishment of the Party II.

14. From evidence led by both parties, it appears that the Party I is claiming that she was doing work as Tailor, while according to the Party II, the Party I was doing work as Helper in its establishment. The Party I has produced xerox copy of letter of appointment at Exb. W-1. Her evidence supported by xerox copy of the letter of appointment makes it clear that she was appointed as Tailor in establishment of the Party II w. e. f. 12-4-85.

15. The appointment letter is issued under signature of witness Peter Rodrigues. Learned Advocate appearing on behalf of Party II vehemently and elaborately argued before me that letter of appointment is issued not by the sole Proprietor Joseph Pereira but by the witness Peter Rodrigues who is one of the employees in the establishment of the Party II. The letter of appointment is procured with the help of the employee Peter Rodrigues by the Party I. Such letter of appointment is not binding on the sole proprietor of the Party II. The Party I did not hold diploma in tailoring. She is not doing work of cutting, tailoring and of taking measurements of clothes. Therefore, according to him, evidence led by the Party II that she was doing work of tailoring in the establishment of the Party I should not be relied upon.

16. The witness Peter Rodrigues is one of the family members of the sole proprietor Joseph Pereira working in the establishment of the Party II. The sole proprietor is shown as an employer in the letter of appointment given to the Party I and which is signed for and on behalf of the establishment by the witness Peter Rodrigues. It is pertinent to note that the sole proprietor Joseph Pereira did not enter into the witness box but what he has done is that he has executed Deed of Power of Attorney in favour of the witness Peter Rodrigues. Adverse inference will have to be drawn against the sole proprietor. If at all, the letter of appointment issued by the witness Peter Rodrigues in favour of the Party I was really without knowledge or consent of the sole proprietor, in that event, the sole proprietor certainly would not have allowed the Party I to work in his establishment. There is nothing either in oral evidence led by the Party II or on record to show as to whether the sole proprietor has taken objection at any time for appointment of the Party I in his establishment.

17. The Party II establishment has maintained register of employment. The original register is at Exb. E-3. It is for the period from month of June, 1986 till the month of January, 1989. Name of the Party I is in the register till the month of October, 1988. Nature of work done by the employees is shown in column No. 3 of this register till the month of January, 1988. The Party I is regularly shown as Tailor during period from month of June, 1986 till month of January, 1988. Being sole proprietor of the Party II, Joseph Pereira must be aware of this fact. If at all the Party I was not appointed as a Tailor, there was no reason to show nature of work as Tailor against her name in register of employment. Evidence of the Party I supported by xerox copy of letter of appointment, entries from register of employment showing nature of work done by her, and the above circumstances if considered together, net result which emerges therefrom is that the Party I was appointed as a Tailor in the establishment of the Party II as rightly pointed out by learned Advocate of Party I.

18. The learned Advocate of Party II submitted that while deciding the issue as to whether the Party I was appointed as a Tailor, not only the designation of the employee shown in the letter of appointment, but nature of the work which the Party I was doing also requires to be taken into consideration. If nature of the work done by the Party I is considered and since the Party I was not holding diploma in tailoring work, in his opinion, the Party I cannot be said to be a Tailor.

19. The argument advanced by learned advocate of the Party II is more in enthusiasm rather than in merits. Once the Party I is appointed as a tailor under letter of appointment, it is not open for the Party II to say that the Party I was not appointed as tailor. The Party II establishment cannot approbate and reprobate at one and the same time on the same issue. The Concise Oxford Dictionary (9th Edition) lays down meaning of 'tailor' as 'maker of clothes'. Though evidence led by both parties shows that the Party I was doing work of stitching clothes and that she was not doing work of cutting and tailoring the clothes, the work of stitching clothes is one of the basis in process of making clothes. Case made out by the Party I that she was appointed as a tailor in the establishment of the Party II appears to be more probable, convincing and trust-worthy than that of the Party II.

20. Now coming to question on last drawn salary of the Party I, there is oral evidence of the Party I and which is consistent with pleadings in the claim statement. It appears from her evidence supported by pleadings in the claim statement that her last drawn salary was Rs. 450/- p. m. The Party II at the end of para 11 in its written statement at Exb. 6 admitted that in the months of April and May, 1992, the Party I was paid wages at the rate of Rs.18/-per day which were corresponding to Rs. 450/- for 25 working days per month. Therefore, though there is no documentary evidence in the form of pay slip on behalf of Party I, it can safely be concluded that her last drawn salary in the month of May, 1992 was Rs. 450/- per month. In view of this reason and above discussion, I accept case made out by the Party I. I answer the issue in the affirmative.

21. *Issue No. 2*:- According to the Party I, she was working as a tailor in the establishment of the Party II w. e. f. 12-4-85 till 15-5-92. Peter Rodrigues who is also looking after the establishment of the Party II orally terminated her service w. e.f. 16-5-92.

22. Cumulative effect of evidence of Peter Rodrigues and of witness Justina D'Souza examined by the Party II on its behalf is that on 15-5-92 the Party I raised quarrel with an employee by name Cassilda Lobo who was also working in the establishment of the Party II, and left her service w. e. f. next day i. e. 16-5-92 by collecting dues. Since then, she did not return to join her duties.

23. From the above evidence led by both parties, question which arises for consideration is whether there is termination of service of Party I by the Party II or whether there is abandonment of service by the Party I. At the very outset, it should be pointed out that there is no documentary evidence on behalf of the Party I to prove that her services are terminated. Admittedly, the Party I is not in service w. e. f. 16-5-92. She was working as a tailor in the establishment of the Party II for a period of seven years approximately from the date of appointment. Under this circumstances, it is difficult to believe that after doing work as a tailor for a period of seven years she would voluntarily abandon her service and that to because of her alleged quarrel with the employee Cassilda Lobo. It is evident that she made complaint on 1-6-92 to the Assistant Labour Commissioner, Mapusa-Goa. The complaint is made within 15 days from the date 16-5-92. Copy of the complaint is at Exb. W-6. By this complaint she brought to the notice of the Assistant Labour Commissioner that the employer orally terminated her services w. e. f. 16-5-92. If at all there was abandonment of service by the Party I, it was necessary for the Party II to hold domestic enquiry against the Party I. Nothing such has been done by the Party II. Considering all these circumstances, I hold that the case made out by the Party I that her service is terminated w. e. f. 16-5-92 imports reliability and confidence. I agree with argument advanced in this regard by the learned Advocate of Party I.

24. Learned Advocate of Party I further argued that the termination of service of Party I by the Party II is against provision contained in Section 39 of the said Act, 1973, and in Rule 23 of the said Rules, 1975 and therefore, the termination is illegal and unjust. In support of his argument, he relied upon decision given by the Hon'ble High Court of Andhra Pradesh in case of *B. Subbiah and Andhra Handloom Weavers' Co-op. Society Ltd, and others reported in 1978, 1, LLJ, 37.* In this reported case the petitioner was employed in the respondent Society. He was dismissed from service. The Labour Court upheld the dismissal. Therefore, the Petitioner took up the matter of petition to the Hon'ble High Court of Andhra Pradesh. Sub-rule 3 of Rule 20 of Andhra Pradesh Shops and Establishments Act, 1963 provide that:

> *"In awarding punishment under this Rule,..... the employer shall take into account the gravity of the misconduct, the previous record, if any, of the employee and any other extenuating or aggravating circumstances that may exist."*

The Hon'ble High Court of Andhra Pradesh further held that Rule 20(3) is not a mere statutory provision but a statutory condition of service and as such, when the employer fails to fulfill the condition, the order of dismissal is vitiated by illegality.

25. The establishment of the Party II is registered under the said Act of 1973. This fact becomes clear from evidence of the Party I as well as of the witness Prakash Bandekar who is working as Assistant Labour Commissioner, Mapusa-Goa. Obviously, provisions of the said Act, 1973 are applicable to the establishment of the Party II. Section 39(1) of the said Act, 1973 lays down that:

> *"No employer shall without a reasonable cause and except for misconduct, terminate the service of an employee who has been in his employment continuously for a period of not less than six months without giving such employee, at least one month's notice in writing or wages in lieu thereof and a gratuity amounting to fifteen day's average wages for each year of continuous employment."*

26. Rule 23(1) of the said Rules 1975 provides that:

> *"No employer shall terminate the services of an employee under section 39 unless an enquiry is held against the employee concerned in respect of any alleged misconduct in the manner set forth in sub-rule (2)".*

Sub-Rule (2) of Rule 23 provides for procedure to hold enquiry against the employer.

27. The Party II did not terminate service of the Party I for misconduct, therefore, provision contained in Rule 23 in the said Rules, 1975 has no application. Only the provision contained in Section 39(1) of the said Act, 1975 will have to be taken into consideration. The Party I was working in establishment of the Party II i. e. the employer continuously for a period of not less than six months. The Party II while terminating service of the Party I did not give to the Party I atleast one month's notice in writing or wages in lieu thereof and gratuity amounting to fifteen days average wages for each year of continuous employment. It follows that the Party II did not comply with the statutory provision. Therefore, and by relying upon decision given by the Hon'ble High Court of Andhra Pradesh in case of B. Subbiah referred to above. I hold that the Party II terminated services of the Party I in contravention of Section 39 of the said Act, 1973 and as such, the dismissal is vitiated by illegality.

28. *Issue No. 3:*– Section 25-F of the said Act, 1947 lays down that:

> *"No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until–*
>
> *(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice,*

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen day's average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [for such authority as may be specified by the appropriate Government by notification in the Official Gazette].

29. Learned Advocate of Party I argued that Party I was in continuous service for not less than one year under the employer i. e. the Party II. The conditions which are precedent to retrenchment of workman and which are laid down by Section 25-F of the said Act, 1947 are not complied with by the Party II while terminating service of Party I. Therefore, in his opinion, the termination of service of the Party I is in contravention of Section 25-F of the said Act, 1947.

30. In reply learned Advocate of Party II pointed out that termination of service of the Party I is governed by Sec. 39 of the said Act, 1973. Therefore, according to him, the question of making compliance with the conditions laid down by Section 25-F of the said Act, 1947 does not arise.

31. Important question which is raised by learned Advocate of Party II during the course of his argument is that when termination of service of the Party I is governed by Section 39 of the said Act, 1973, whether in such situation, the Party I can take recourse of the provision contained in Section 25-F of the said Act, 1947. In this context, I may safely lay my hand on decision given by the Hon'ble High Court of Karnataka in case of *A. Gopal Naidu..... Petitioner v/s State of Karnataka & Ors..... Respondent* reported in *1989 1 CLR page 413.* The question which was involved in the Writ Petition was whether the authority constituted under the Karnataka Shops and Establishments Act, 1961, is the proper and only forum for adjudication of the dispute between the employer and the employee covered by that Act. In other words, whether the Labour Court had no jurisdiction to entertain the application of such employees under Section 33-C (2) or reference of such employees under Section 10 of the Industrial Disputes Act, 1947. The Hon'ble High Court of Karnataka held that:

" The language of Section 35 of the Karnataka Shops and Establishments Act is clear and in unmistakable terms it provides an alternative forum for the employees to approach the Courts constituted under the Industrial Disputes Act if it is established that they are also workmen covered under the Industrial Disputes Act. Section 39(7) of the Karnataka Shops and Establishments Act is the provision which enables the employees covered by that Act to claim reliefs which are covered by Sections 39 (1) and (3) of that Act. That is all the limited scope of Section 39(7). It does not expressly or impliedly act in derogation of the provisions of Section 35 of that Act which confers a right on the employees to approach the forum available under the Industrial Disputes Act if they are workmen who are covered by that Act. Therefore, when the respondent employees are covered by the Industrial Disputes Act, their right to approach the Labour Court is not expressly or impliedly taken away by the provisions of Section 39(7) of the Karnataka Shops and Establishments Act or the provisions of Section 25-J(2) of the Industrial Disputes Act".

32. In the present case, the Party I was employed in establishment of the Party II to do skilled work as a tailor on wages. Therefore, the Party II is a workman as defined under Section 25(S) of the said Act, 1947. The Party I had a remedy to seek redressal in respect of termination of her service under Section 40 of the said Act, 1973, because an authority is appointed by the Government of Goa to hear and decide appeals arising out of termination of service. This provision further lays down remedy to recover amount which is directed to be paid as rightly pointed out by learned Advocate of Party II. There is a provision in shape of Section 60 under the said Act, 1973. Relevant portion of this provision lay down that:

"Nothing in this Act shall affect any rights, privileges which any employee in any establishment is entitled to, on the, date on which this Act comes into operation in respect of such establishment, under any other law, contract, custom or usage applicable to such establishment, if such rights or privileges are more favourable to him than those to which he would be entitled under this Act."

33. Right conferred on the Party I under provision of the said Act, 1947, is more favourable to her than that to which she is entitled under the said Act, 1973. It follows that the said Act, 1973 does not expressly or impliedly take away right of Party I to approach the Labour Court. Therefore, and relying upon decision given by the Hon'ble High Court of Karnataka in case of *A. Gopal Naidu* referred to above, I hold that even though termination of service of Party I is governed by Section 39 of the said Act, 1973, the Party I is entitled to avail remedy under provision of the Industrial Disputes Act, 1947.

34. The Party II did not comply with conditions while terminating service of the Party I and which are laid down by Section 25-F of the said Act, 1947. I, therefore, answer the issue in affirmative.

35. *Issue No. 4:-* The Party II challenged maintainability of the reference on grounds that (1) it is not carrying on any industry as defined in provision of the said Act, 1947; (2) there is no industrial dispute between the parties within meaning of the said Act, 1947; (3) the Party I has remedy to seek redressal of her grievance under provision of the said Act, 1973, and (4) this Court has no jurisdiction to entertain and to decide the reference as pleaded in paras No. 1 to 4 of the written statement.

36. Section 2(j) of the said Act, 1947 defines industry as follows:

"Industry" means any business, trade, undertaking,

manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen".

The Party II is running business of stitching clothes. Therefore, it is an industry as defined under Section 2(j) of the said Act, 1947.

37. Section 2(k) of the said Act, 1947 defines industrial dispute as follows:

"Industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any persons;"

In the present case, there is a dispute between employer and workman i.e. between the Party II and Party I respectively, which is connected with employment or non-employment of the Party I. I, therefore, hold that there is an industrial dispute between these two parties as defined under Section 2(k) of the said Act, 1947. I have already held that even though establishment of the Party II is registered under the said Act, 1973, the Party I who was employed in this establishment can avail remedy in provision of the said Act, 1947. The Party I is the workman while the Party II is the employer. There is industrial dispute between the two. The dispute is referred by appropriate Government i. e. by the Government of Goa to this Industrial Tribunal for adjudication. The Industrial Tribunal certainly exercise jurisdiction to entertain and to decide the reference. The ground raised by the Party II to challenge maintainability of the reference are devoid of merits. Those are not acceptable. I therefore, answer the issue in the negative.

38. *Issue No. 5:–* Termination of service of the Party I is proved to be in contravention of provision contained in Section 39 of the said Act, 1973 and in Section 25(F) of the said Act, 1947. Only on this ground, it can safely be concluded that the act of the Party II in terminating service of Party I is illegal and unjustified.

39. Learned Advocate of Party I to prove that, termination of service of Party I is illegal and unjustified relied upon decision given by the Hon'ble Supreme Court in case of *The Krishna District Co-op. Marketing Society Ltd. Vijayawada.....Petitioner.....V/s N. V. Puranchandra & Others,.....Respondents* reported in *1987 II CLR 213.* In this reported case, Petitioner Co-operative Society retrenched nine of its clerks. The common contention of the clerks before the Division Bench of the Hon'ble High Court was that the question of their retrenchment was governed by Section 25-F of the Central Act and not by the State Act. Division Bench accepted the contention holding that the orders of termination were unsustainable. Therefore, Petitioner Society took up the matter before the Hon'ble Supreme Court by Special leave. The Hon'ble Supreme Court held that:

"The alternate authorities prescribed under Section 41 of the State Act to settle the dispute arising out of retrenchment may exercise their jurisdiction under the State Act, but they had to decide said dispute in accordance with the provisions of Chapter-VA of the Industrial Disputes Act that is Central Act. Even if the State Act is applicable, non-compliance of Chapter V-A of the Central Act would render retrenchment illegal."

The Hon'ble Supreme Court in the above reported case further held that:

"Retrenchment of an employee in an establishment governed by the State Act is not governed by the provision made in Section 40 of the State Act but by provisions of Chapter V-A of Central Act which deal with lay off and retrenchment".

39. Relying upon decision also given by the Hon'ble Supreme Case referred above, I hold that termination of service of the Party I w. e. f.16-5-92 by the Party II is illegal and unjustified in view of the fact that termination of service is in contravention of provision contained in Section 39 of the said Act, 1973, and in Section 25-F of the said Act, 1947. My answer to the issue is in the affirmative.

40. *Issue No. 6:–* Termination of service of the Party I by the Party II is proved to be illegal and unjustified. Therefore, learned Advocate of Party I submitted that as per provision contained in Section 11-A of the said Act, 1947, the Party I is entitled to reinstatement in service of the Party II with full back wages. The argument advanced by the learned Advocate of Party I is strongly opposed by learned Advocate of Party II. He argued that the Party II had made an offer during the course of proceeding before the Assistant Labour Commissioner and also in the written statement filed in answer to the claim statement of the Party I to rejoin her duty in its establishment. The Party I did not give response to the offer given by the Party II. Therefore, according to him, the Party I is not entitled to reinstatement in service and also to full back wages. In support of his argument, he relied upon decisions given by the Hon'ble High Court of Bombay in cases of *Raju Shankar Poojary v/s Chembur Warehouse Company & another* reported in *2003 LLR 1150* and in case of *Sonal Garments v/s Trimbak Shankar Karve* reported in *2003 (1) LLN 91.*

41. The Hon'ble High Court of Bombay held in case of *Raju Shankar Poojary that:–*

"A workman cannot reap the benefit of own fault when he fails to respond the offer of the employer to join duties more particularly when such offer was reiterated before the Conciliation Officer and the Labour Court".

42. The Hon'ble High Court of Bombay held in case of *Sonal Garments that:*

"Whenever employer offers to reinstate workman at any stage of the dispute and the same is not accepted even without prejudice to his rights, he will not be entitled to continue his claim for reinstatement or for his claim for back wages from the date of such offer".

43. Admittedly, the Party II had given offer before the Conciliation Officer to the Party I to join her duties and same is reiterated by the Party II in its written statement. However, it should be taken into consideration that according to the Party II, the Party I was appointed as helper and she was doing work in the same capacity. It is proved

that the Party I was appointed and that she was doing work as tailor. The Party I gave offer to the Party I to join the duty as helper in its establishment. When the Party I was appointed and she was working as a tailor, the offer given by the Party II to the Party I cannot be said to be with bonafide intention. The Party I was justified in not giving response to the offer given by the Party II. I therefore, do not agree with argument advanced by learned Advocate of Party II. I hold that the Party I is entitled to reinstatement in service.

44. So far, the question of awarding full back wages is concerned, the learned Advocate of Party II argued that full back wages cannot be allowed automatically or mechanically only because an order of termination is found to be illegal and unjustified. In this connection, he relied upon decision given by the Hon'ble Supreme Court in case of *U. P. State Brassware Corporation Ltd., and another* ..... Appellant v/s *Uday Narain Pandey* ..... Respondent, reported in *(2006) 1 SCC 479.* He further pointed out in his argument that the Party I is doing stitching work at her home. She is earning income by doing such work. On this ground also, he urged not to extend benefit of full back wages to the Party I. Evidence of the Party I do clearly reveals that since termination of her service by the Party II, she is not gainfully employed. She admitted in her cross examination that even after termination of her service by the Party II, she is doing tailoring work at her home. If follows that she must be getting some income from this work as rightly pointed out by learned Advocate of Party II. In my view, the fact that the Party I is doing tailoring work at her home does not mean that she is gainfully employed. I therefore, hold that the fact that she is doing such work at her home will not dis-entitle her to claim benefit of full back wages.

45. Observation made by Hon'ble Supreme Court in case of *Surendra Kumar Verma v/s Central Government Industrial Tribunal-cum-Labour Court* reported *in (1980) 4 SCC 443* are reproduced by the Hon'ble Supreme Court in the case of *U. P. State Brassware Corporation Limited and another v/s Uday Narain Pandey* relied upon by the learned Advocate of Party II. If observations are quoted, that will make the position very clear. I quote the observation which are on page No. 489:

> *"Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the Court to make appropriate consequential orders. The Court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The Court may deny the relief of Award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the Court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."*

46. There is nothing in evidence in the present case to show that the establishment of the Party II is closed down. There is no such case also of the Party II. There is also no evidence to hold that if relief of full back wages is granted that would place an impossible burden on the employer i. e. the Party II. No special impediment in the way of awarding the relief of full back wages is clearly shown especially by the Party II/Employer. In view of this position, the above observation made by the Hon'ble Supreme Court, and of findings given to issues No. 1 to 5, I hold that the Party I is entitled to the relief of reinstatement with full back wages. My answer to the issue is in affirmative.

47. As a result of findings to issue Nos. 5 and 6, I hold that the reference which is made by the Government of Goa to this Industrial Tribunal will have to be adjudicated in the negative. With this, I proceed to adjudicate the reference by passing order as follows:-

ORDER

1. The action of M/s. Mac Tailors, Fiera Alta, Mapusa Goa, in terminating the services of Mrs. Filomena Fernandes, Tailor, w. e. f. 16-05-1992 is not legal and justified.
2. Termination of service of the Party I w. e. f. 16-05-1992 by the Party II is set aside.
3. The Party II is directed to reinstate the Party I in its service as a Tailor with full back wages.
4. No order as to costs.
5. The Award be submitted to the Government of Goa as per provision contained in Section 15 of the Industrial Disputes Act, 1947.

Sd/-

(Dilip K. Gaikwad),
Presiding Officer,
Industrial Tribunal &
Labour Court - 1.

www.goagovt.nic.in/gazette.htm
GOVERNMENT PRINTING PRESS,
PANAJI - GOA.
Price : Rs. 7.00